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In the
SUPREME COURT OF THE UNITED STATES

October Term 1984

No. _____

SHELDON SANDERS,

Petitioner,

—against—

COMMISSIONER OF CORRECTIONS OF THE
STATE OF NEW YORK and
ROBERT ABRAMS, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Respondents.

**PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment right of counsel applies solely to persons who have been formally arrested or indicted, and to none others?
2. Whether a person who has been informed by the prosecutor that he is the target of an investigation, has been served with a grand jury subpoena, and has retained counsel who in turn has notified the prosecutor of that fact, may nevertheless be interrogated by the prosecutor with the deliberate intention of eliciting incriminatory statements in the absence of his attorney?
3. Whether this Court should redefine the principles of *MASSIAH v. UNITED STATES*, 377 U.S. 201, to make it explicit that no person accused of crime or informed by the police or prosecutors that he is the target of an investigation, may be interrogated in the absence of counsel once the authorities have been informed by him that he has retained counsel?
4. Whether the determination of the Court below, which, in essence, holds that the right of counsel does not exist until a person is either indicted or arrested, is consistent with the Sixth Amendment and *MASSIAH v. UNITED STATES*, and its progeny?
5. Whether, under the facts of this case, a prosecutorial agent "deliberately elicited" incriminatory statements from Sanders within the meaning of *MASSIAH*?
6. Whether the prosecution intentionally created a situation at a critical juncture, likely to induce Sanders to make incriminating statements without the assistance of counsel, at a point in time when the prosecution knew Sanders had obtained a lawyer?
7. Whether a prosecutor is at liberty to ignore the fact that a target of a Grand Jury and prosecutor's investigations has retained counsel, and proceed to deceive him into making incriminatory statements, merely because he has not yet been

formally charged with the crimes?

8. Whether this Court will recognize that under the unusual circumstances of this case, a question of first impression is presented to it, to wit, whether the right of counsel must be respected under the circumstances of this case, irrespective of the fact that no indictment or arrest has occurred as yet? This case does not involve the question of the right to counsel but does involve the question of a defendant's rights after counsel has been retained.

THE PARTIES

The parties hereto are the Petitioner and the Respondents. No other parties were involved in the Court below.

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OPINION BELOW

The opinions of the United States Court of Appeals and the United States District Court are reproduced in the Appendix hereto.

JURISDICTION

The determination of the United States Court of Appeals, and its order of affirmance were made on the 17th day of April, 1984.

The opinion of the New York Court of Appeals, which divided 4 to 3, against the petitioner herein, is reported at

Sheldon Sanders, who was an attorney at law admitted to practice in the State of New York, had been arrested and indicted for conspiracy and bribery of a law assistant, Abram Brown, employed in the Supreme Court of New York County. Brown, however, died prior to Sanders' trial, and was not able to testify, but his voice had been recorded by the authorities, in conversations with an undercover informant by the name of Paul Goldberg, who happened to also be an attorney at law. Goldberg never witnessed Sanders committing any crime, and his conversations with Brown virtually never mentioned Sanders.

Goldberg also made tape recordings of conversations he had with Sanders (none of which ever included the presence of Brown). One conversation recorded by Goldberg in particular, which occurred on June 9, 1977, which was after Brown's arrest and following Sanders being informed by the prosecutor that he was the target of an investigation and being served with a subpoena for the Grand Jury, which immediately prompted Sanders to retain an attorney, who in turn immediately informed the District Attorney and Paul Goldberg of his retention, that is the key issue herein.

The Courts below, in essence, have held that irrespective of the fact that Sanders was informed that he was the target of an investigation and that he was served with a Grand Jury subpoena, coupled with the fact that he had retained a lawyer who notified the authorities and Goldberg of that fact, that he nevertheless was not entitled to the aid of counsel and that the authorities were free to question him and deliberately elicit incriminatory statements from him in the absence of his attorney, by insidious design or otherwise.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 and 1257. The order of the Court below affirming the determination of the District Court was rendered and entered on the 17th day of April, 1984.

INTRODUCTORY

This appeal presents what we perceive to be a matter of first impression. Petitioner, a former attorney at law in the State of New York, was convicted in the Supreme Court, New York County, of bribery second degree and conspiracy, after a trial before Honorable Dennis Edwards and a jury. The case was appealed up through the New York Court of Appeals, which ultimately affirmed the judgments of conviction by a 4 to 3 split.

All the Judges of the Court of Appeals ruled that petitioner Sanders had been deprived of his Constitutional rights to Counsel by a deceptive practice employed by the District Attorney's office of New York County.* This deception consisted of using a cooperating undercover individual, an attorney by the name of Goldberg, to inveigle Sanders to call the District Attorney's office, thinking he was calling a "garage," and then engage Sanders in a conversation which was recorded by the District Attorney, as a result of which a highly incriminatory admission was obtained from Sanders.

The novel issue which is presented by that procedure is crystallized by the unusual circumstances under which this statement was wrested from Sanders by the insidious behavior of the prosecution and the undercover informant.

Sanders had been subpoenaed to a grand jury and was informed that he was the subject matter of an investigation concerning bribery and so forth of a public official employed by the Supreme Court of New York County, namely Abram Brown. Sanders immediately retained an attorney to represent him and that attorney notified the District Attorney of New York County of his retention.

In addition, that same lawyer also communicated the fact of his retention to Mr. Goldberg, who was also working with the District Attorney, unbeknown to Mr. Sanders at that time.

Thus, at the time that the District Attorney determined to

* Four Judges said the error was harmless.

obtain an incriminatory statement from Sanders, the District Attorney and the undercover informant were fully aware of the fact that Sanders had in fact retained an attorney to represent him; that he was the subject of a grand jury investigation; that Goldberg had actually testified against Sanders already in the grand jury, prior to this conversation; and that Sanders and his attorney were totally unaware of the fact that Goldberg was cooperating with the District Attorney's office.

Additionally, Sanders was unaware of the fact that he was calling a telephone number which was in the wireroom of the New York District Attorney's office, when he received a message from Goldberg to call him at that number. Sanders was also unaware of the fact that the District Attorney of New York County was recording the conversation between him and Goldberg, and consequently, the only evidence of an actual admission by Sanders of involvement in a bribery was obtained in this deceptive fashion.

The New York Court of Appeals unanimously found that the District Attorney of New York County had acted improperly in obtaining this incriminatory statement, in the absence of counsel, from Sanders. Four Judges, however, determined that the defendant in that case, namely petitioner herein, had not been "prejudiced" by what had happened, because they determined that the statement was "harmless" error.

Judge Broderick, in the Court below, addressed himself specifically to the issue of whether the error of admitting this incriminatory statement into evidence at the trial was harmless, and specifically found that it was not harmless error, and determined that it could not be harmless error (47)*.

Thus, if the error was not harmless, then even the Court of Appeals would have to be corrected by this Court, because they found that the only way they could affirm the judgment was by the 4 to 3 split on the question of harmless error.

* Numerals in parentheses refer to pages of the official court reporter's minutes of the hearing before Judge Broderick, unless otherwise indicated.

We believe that the issue of first impression herein lies in the fact that Sanders was not in custody and had not yet been indicted but had hired counsel. There was no doubt, however, that he was the subject of a grand jury investigation. There is no doubt whatever that he was also the subject of an intensive investigation by the District Attorney's office of New York County.

The case law extant at the time of the taping of the incriminatory conversation appears to be that there was no duty to affirmatively inform a person in Sanders' position at the time the statement was obtained, that he had a right to counsel. Notwithstanding that, however, in the case at bar, the District Attorney knew that whether or not Sanders was entitled to be told that he could consult a lawyer, he had actually consulted and retained an attorney. Thus the District Attorney, while under no duty to advise Sanders that he had the right to seek legal assistance, was nevertheless aware of the fact that in this particular case he had undertaken to actually retain counsel, and the District Attorney knew it.

If the right to counsel means anything, it means that the District Attorney or any other prosecutorial agency must respect that status, and must not undertake to undermine the attorney-client relationship by speaking *ex parte* to a client without notifying his lawyer. It is obviously a violation of the Canons of Professional Ethics, since the District Attorney, and in this case the informant, were both attorneys.

Aside from that, however, it was highly improper, we maintain, under then existing case law, to question a suspect who actually had a lawyer, without informing the lawyer or at least giving the suspect an opportunity to notify his attorney that he was going to be questioned.

It is irrelevant, we maintain, for the purpose of this appeal, whether Sanders had a right to be informed that he could hire an attorney. We are dealing herein with a *fait accompli*, namely that whether or not Sanders had the right to be informed of the availability of legal counsel for his assistance, he had undertaken

to hire a lawyer and had informed the District Attorney and the undercover informant of the fact.*

THE HISTORICAL BACKGROUND OF THE CASE

Petitioner Sheldon Sanders had been an attorney at law duly admitted to practice in the State of New York. As a result of a conviction on January 15, 1980, for the crimes of bribery second degree (Penal Law §200.00) and conspiracy (N.Y. Penal Law §105.05), after trial before Honorable Dennis Edwards and a jury in the Supreme Court, New York County, he was sentenced to 1 to 3 years on the bribery to run concurrently with a 90 day sentence on the conspiracy.

The conviction herein rested principally upon tape recordings surreptitiously made by a cooperative informer named Paul Goldberg (also an attorney at law), under the supervision and behest of the district attorney of New York County, of one Abram Brown, a law assistant in the Supreme Court, New York County, and the petitioner, Sheldon Sanders. At no time was any recording ever made of Abram Brown and Sheldon Sanders together. In other words, no recording contains the voices of both Sanders and Brown on the same tape.*

The indictment alleged that a bribe had been paid to Abram Brown in consideration of his allegedly assisting Goldberg, an attorney, who was handling a proceeding under Article 78 CPLR for a plaintiff pending in Supreme Court, New York County, entitled *Lehman v. Cooperman*.

* This case does not involve a *Miranda* issue at all. It turns on the thrust of *Massiah* [v. United States], 377 U.S. 201.

* Goldberg never witnessed Sanders commit any crime at all.

There was no evidence that the petitioner herein had in fact ever paid any money whatsoever to Brown, and the only charge in the indictment that referred to petitioner giving \$250.00 to Brown was the subject of an acquittal by the jury.

Furthermore, there was no evidence that Sanders ever knew that Goldberg had paid any money to Brown.

Petitioner was obviously unable to confront Brown during the trial, since Brown had long since died prior to the commencement of the action. Brown had not testified in the grand jury.

Following Brown's arrest by more than a month, and after the commencement of a grand jury proceeding of which petitioner was a prime target, Sanders was himself served with a grand jury subpoena by the district attorney's office. He immediately retained counsel who notified the district attorney of his retention, and, by coincidence, also spoke to Paul Goldberg, telling him he had been retained by Sheldon Sanders, although at that time the attorney was unaware of the fact that Goldberg was an undercover informer acting in behalf of the district attorney of New York County.

It must be borne in mind that Sanders at all times believed that Goldberg was his friend and was concerned about Goldberg's possible involvement in the grand jury investigation. Sanders know nothing about the fact that Goldberg was playing a scenario in an undercover capacity on behalf of the district attorney of New York County.

After Brown's arrest, and following the notification to the district attorney and Goldberg that Sanders had retained counsel, the district attorney supplied a telephone number to Goldberg, which was actually located at the district attorney's office, and caused Goldberg to telephone Sanders with instructions to call Goldberg back at that particular telephone number.

This occurred on June 9, 1977.

It is this crucial tape which is the prime subject of the petition for habeas corpus.

This conversation, which was post-conspiratorial and after the retention of counsel and the notification of that fact to the

district attorney and Goldberg, played a major role in the conviction of Sanders.* The district attorney recorded the conversation and, over objection at trial, used it against Sanders. This conversation was the only conversation in which Sanders specifically indicated that he was aware of the fact that Goldberg had been seeking to influence Abram Brown and that he felt that he himself had some exposure. Goldberg posed several questions to Sanders during this conversation, eliciting incriminatory information. This was by no means a one-sided conversation.

The prosecution at trial, itself expressed grave reservations over the fact that it had recorded a conversation between Sanders and Goldberg at a point in time after a grand jury proceeding had commenced with Sanders as its prime target, and following the prosecutor's notification of the fact that Sanders had retained counsel.

In fact, assistant district attorney Ferrara stated, at 1513 of the record:

"Finally, ladies and gentlemen, I want to comment on the June 9, 1977 tape. Frankly, brutally frankly, I wish the tape didn't exist!"

Of course, by saying this the prosecution did not disabuse the jury of the contents of the tape but, on the contrary, focused its minds on the tape even more so. The Court, of course, instructed the jury that they had every right to consider the tape.

Actually there were two recordings made after Brown's arrest which obviously terminated any possible conspiracy which existed. The prosecutor, therefore, posed the issue himself during the trial, at page 394 of the record, stating:

"I guess there are, as I see it, two issues. The first issue is whether I can play the Brown-Goldberg tapes for the jury and the second issue is whether the recordings which were made on May 23rd and June 9th are admissible."

* The three dissenting judges said it was crucial.

A pretrial motion before Honorable Harold Rothwax was decided by that Justice, to the effect that the conspiracy had terminated with Brown's arrest and that the May 23rd and June 9th post-arrest tapes could not be listed as overt acts in furtherance of a conspiracy.

Thus, we maintain they could not even be deemed co-conspiratorial. That, of course, was the theory upon which the tape was admitted.

In sum, therefore, we ask the Court to consider the state of facts which existed at the time the June 9th tape was allowed into evidence over objection.

1. Paul Goldberg, an attorney himself, was working in an undercover capacity, unknown to Sanders or his lawyer, for the district attorney of New York County.

2. A grand jury proceeding commenced at which Goldberg had already testified against Sanders.

3. Sanders had received a subpoena in connection with that investigation.

4. Sanders had retained Richard Dienst, Esq., attorney at law, in connection with that investigation, and Mr. Dienst admittedly, and concededly, had notified the district attorney and Paul Goldberg of his retention.

5. Sanders had been trying to reach Goldberg because of the grand jury proceeding, not being aware of the fact that Goldberg was an agent of the district attorney.

6. When Goldberg informed the district attorney of the fact that Sanders was trying to reach him, the district attorney told Goldberg to leave a telephone number where Sanders could call Goldberg.

7. That telephone number was located in the district attorney's office and was answered "Garage", so that the caller would believe he was calling a garage.

8. Goldberg actually received the call from Sanders on June 9, 1977, and engaged him in a conversation which included

several promptings and questions from Goldberg which elicited incriminatory statements from Sanders.

9. The district attorney recorded this conversation, and used it, over objection, at the trial against Sanders.

10. All seven judges of the Court of Appeals found that this conversation violated Sanders' rights to counsel, but four of the seven judges held that it was harmless error.

11. United States District Judge Vincent Broderick, however, in the Court below, ruled that the conversation could not be considered harmless error at all.

12. Judge Broderick, however, did not believe that the violation constituted Constitutional error, because Sanders had not been arrested.

13. Judge Broderick, nevertheless, granted a certificate of probable cause to appeal to this Tribunal.

14. The United States Court of Appeals, in essence, agreed with Judge Broderick of the District Court, that unless an arrest or an indictment has occurred, there is no right of a suspect in a criminal investigation to have counsel, and the police and prosecutors may totally ignore the fact that a suspect has retained counsel, even though they have been made aware of such retention and have designated the suspect as a target of an investigation. The Court however did not address the question of a defendant's rights after counsel has been retained.

15. This Court is asked to review the thrust of the so-called "MASSIAH doctrine". As petitioner interprets that doctrine, MASSIAH bars *any* government efforts to "deliberately elicit" information from an individual, regardless of whether these efforts constitute "interrogation" within the meaning of MIRANDA and if that individual has retained counsel in connection with the subject matter of the interrogation and that fact is known to the interrogators.

There is no suggestion that Sanders waived his right to counsel, so that is not an issue in this case at all.

The Court is asked to recognize that the District Court and the United States Court of Appeals, as well as the highest Court of the State of New York by a 4 to 3 split, have, in essence, held that no right of counsel exists until a person is either indicted or arrested. We fully recognize that it would be intolerable to prevent or preclude investigation of criminal activity by virtue of retaining a lawyer in general and announcing that fact to the world. Such is not the case herein.

The issue herein is whether, under the unusual circumstances of this particular case, one where Sanders was denominated a target of an investigation and had been informed of that fact, his right of counsel should have been respected by the interrogating authorities, irrespective of the fact that he had not yet been indicted or arrested.

This case does not involve the question of the right to counsel but does involve the question of a defendant's rights after counsel has been retained.

POINT I

THE USE OF THE JUNE 9, 1977 TAPE RECORDING BETWEEN SANDERS AND GOLDBERG, SURREPTITIOUSLY RECORDED BY THE DISTRICT ATTORNEY AFTER SANDERS HAD RETAINED COUNSEL, BUT IN THE ABSENCE OF THAT LAWYER, VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE ASSISTANCE OF COUNSEL, AND THE STATEMENT THUS OBTAINED SHOULD HAVE BEEN SUPPRESSED.

(A)

IT IS IRRELEVANT AS TO WHETHER SANDERS WAS ENTITLED TO THE ASSISTANCE OF COUNSEL OR RECEIVING MIRANDA WARNINGS, SINCE THE FACT IS THAT HE HAD ACTUALLY RETAINED COUNSEL AND HAD NOTIFIED THE PROSECUTOR AND THE UNDERCOVER AGENT, GOLDBERG, OF THAT FACT.

We ask this Court to consider what is interrogation? And when does it matter?

The June 9, 1977 tape clearly constituted an insidious and deceptive means to interrogate Sanders at a point in time after he had become a target of a grand jury investigation and following his retention of counsel, which fact had been disclosed to the district attorney and the undercover agent Goldberg.

In *Brewer v. Williams*, 430 U.S. 387, 51 L.ed 2d 424, the Massiah doctrine (377 U.S. 201, 12 L.ed 2d 246) offered an easier route to reversal than *Miranda*, 384 U.S. 436, in two respects:

(1) Massiah bars *any* government efforts to "deliberately elicit" information from an individual, regardless of whether these efforts constitute "interrogation" within the meaning of *Miranda*;

and (2) Massiah's Sixth Amendment basis suggests that any "waiver" of the right to counsel should be tested by an especially stringent standard.*

The Williams case reached the Supreme Court in a federal habeas corpus proceeding.

A Massiah violation will typically cast no doubt on the trustworthiness of the defendant's statements. But the Massiah "exclusionary rule" is not merely a prophylactic device; it is not designed to reduce the *risk* of actual Constitutional violations and is not intended to deter any pretrial behavior whatsoever. (See Kamisar, La Fave and Israel, "Modern Criminal Procedure-1982 Edition, Chapter 8").

The failure to exclude evidence cannot be considered *collateral* to some more fundamental violation. Instead, it is the admission at trial that it, in itself, denies the Constitutional right. When the government has made an "end run" around counsel, or effected pretrial discovery in disregard of the norms of legitimate adversary procedure, it is wholly beside the point to claim that the evidence obtained by such tactics was reliable. Use of the evidence taints the judicial proceedings in a fundamental way, and the relief on a habeas corpus must remain open.

Thus, we do not have a Miranda situation herein. We are dealing with the thrust of the Massiah case.

In *United States v. Henry*, 447 U.S. 264, 65 L. Ed.2d 115 [1980], the Supreme Court reversed a conviction because of improper governmental tactics in deliberately eliciting incriminating statements from Henry within the meaning of Massiah.

While in the Henry case the defendant was in custody and under indictment, we perceive no reason why this factor should change the obvious impropriety of the governmental action herein by deliberately obtaining a statement in gross violation of the

* No suggestion that Sanders knowingly waived counsel has ever been made.

right to counsel. In other respects the Henry case is very close to the one at bar.

Goldberg, so far as Sanders knew, was a friend and fellow attorney in whom he could confide, and (2) Sanders was totally unaware of the fact that Goldberg was acting in an undercover capacity as an agent of the district attorney.

As in the Henry case, Nickels, who "played the part of Goldberg" therein, deliberately used his position to secure incriminatory information from Henry when counsel was not present. The Court therefore held that conduct attributable to the government.

While the government in Henry instructed Nickels not to question Henry about the robbery therein, the Court nevertheless noted that Nickles was not a passive listener—rather, he had "some conversations with Mr. Henry while he was in jail and Henry's incriminatory statements were 'the produce of this conversation'".

In Henry the Court stated:

"While affirmative interrogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded as the government contends, that *Brewer v. Williams*, modified *Massiah*'s 'deliberately elicited' test. See *Rhode Island v. Innis*,

The Court further noted in the Henry case that Fourth and Fifth Amendment claims are not relevant herein. (See *United States v. White*, 401 U.S. 745, 28 L. Ed.2d 453)

In HENRY the Court noted that those cases are not relevant to the inquiry under the Sixth Amendment, namely where the government has interfered with the right to counsel of the accused by "deliberately eliciting" incriminating statements.

In a footnote, the Court in Henry, namely footnote 11, points out that custody is not a requirement for Sixth Amendment rights, and observes that *Massiah* was "in no sense in custody at the time of his conversations with his co-defendant".

The Court therefore held in *Henry* that under the strictures of the Supreme Court's holdings of the exclusion of evidence,

" . . . We conclude that the Court of Appeals did not err in holding that Henry's statements to Nickels should not have been admitted at trial. By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, 'the constable blundered'; rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel . . . "

The Court itself notes that the conduct of the district attorney here, and the prosecutor in the *Henry* case, violated Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility which provides:

"(A) During the course of his representation of a client a lawyer shall not:

'(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.' "

POINT II

THE RECENT DECISION BY THE SUPREME COURT OF THE UNITED STATES IN *SOLEM v. STUMES*, -- U.S. --, No. 81-2149, DECIDED 2/29/84, WHICH HELD THAT *EDWARDS v. ARIZONA*, 451 U.S. 477, WAS NOT TO BE APPLIED RETROACTIVELY, IS NOT APPPOSITE TO THE CASE AT BAR. *STUMES* INTERPRETED THE THRUST OF *MIRANDA v. ARIZONA*, 384 U.S. 436, 16 L.Ed.2d 496, AND DID NOT INVOLVE AN INTERPRETATION OF *MASSIAH v. UNITED STATES*, 377 U.S. 201, 84 S.Ct. 1199, WHICH IS INVOLVED IN THE CASE AT BAR. THUS, *SOLEM v. STUMES* DOES NOT IMPACT UPON THE INSTANT CASE AT ALL.

At the opening of the legal arguments in this brief we sought to make it abundantly clear that the issue involved concerned an interpretation of *Massiah v. United States* and its progeny, and not *Miranda v. Arizona*, *supra*.

While *Miranda* concerns itself with custodial interrogation, *Massiah* does not turn upon custody at all, but involves an intentional interference with the right to counsel, irrespective of custody.

For example, in *Massiah*, there is no question but that he was never in custody when the conversation with his co-defendant took place. The Supreme Court, however, held in that case, as well as in *Brewer v. Williams*, 430 U.S. 387, *supra*, and *Spano v. New York*, 360 U.S. 315* that the tactics of the prosecution in using a "false friend" to undermine the accused's Sixth Amendment rights to counsel, was violative of the Sixth Amendment of the United States Constitution.

Miranda v. Arizona is irrelevant to those considerations since

* "An open foe may be a curse, But a pretended Friend is worse" (John Gay, quoted in *Spano*)

it was dealing with custodial interrogation and not a deliberate interference with the right to counsel in the sense of *Massiah v. United States* and its progeny.

As a matter of fact, an examination of the opinions in *Solem v. Stumes* reveals that the Court did not even discuss the impact of *Massiah* or its progeny at all.

Moreover, in the case at bar, unlike *Solem v. Stumes*, the suspect, Sheldon Sanders, was totally unaware that of the fact that Paul Goldberg was an undercover agent of the district attorney. In *Massiah*, too, he was unaware of the fact that the party to whom he was speaking was an undercover agent.

In the *Stumes* case, however, the defendant was well aware of the fact that he was talking to the police and there was no deception at all, in that sense.

Edwards v. Arizona, supra, had held that once an accused who is in custody, having received Miranda warnings, asks for counsel, he may no longer be questioned in the absence of counsel. *Edwards v. Arizona*, however, was held to be non-retroactive by *Stumes*.

In the case at bar, however, we are not concerned with *Edwards v. Arizona* or *Stumes*, or that line of cases, since we are not talking about an in-custody situation at all, where Miranda warnings have been given. We are discussing and we are concerned with undermining the fundamental relationship and right to the assistance of counsel at a critical juncture by use of deception or trickery.

We submit therefore that it is important to note the distinctions between this case and such cases as *Edwards v. Arizona* and *Solem v. Stumes*.

In the case at bar we are dealing with a situation similar to *Massiah* because we note that the prosecution, by intentionally creating a situation likely to induce Sanders to make incriminating statements, without the assistance of counsel, violated Sanders' Sixth Amendment right to counsel. In other words, we don't have the case as presented in *Solem v. Stumes* where, after giving Miranda warnings and knowing of the existence of counsel, the police continued to interrogate the suspect.

As was noted in *United States v. Henry*, supra, the "'constable' planned an impermissible interference with the right to the assistance of counsel. . .".

In *Solem v. Stumes* and *Edwards v. Arizona*, the prosecutor did not plan deliberately to interfere with the right to counsel, but rather the police violated the strictures of *Miranda v. Arizona* referring to custodial interrogation once counsel has come into the case.

Neither Sanders nor Massiah were in custody at the time. Thus, the foregoing cases, such as *Edwards v. Arizona* and *Solem v. Stumes* are not apposite and should not be confused with the case at bar at all. They are totally distinguishable.

We believe, therefore, that the rights of Sanders to the assistance of counsel and to the aid of counsel, in view of the fact that the prosecution was well aware of the fact that counsel had been retained, was violative of his Sixth Amendment rights.

We trust that this Court will not be deceived by arguments that the defendant (petitioner) had not been formally arrested and that no one has a "right to be arrested". (See *Hoffa v. United States*, 385 U.S. 293).

The New York Court of Appeals held that this was a critical juncture of the investigation and constituted a "legal bombshell" (see dissenting opinion of Judge Wachtler and *Matter of Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 440).

The petitioner was already the target of a grand jury investigation and an in-depth investigation by the district attorney. Sanders had already been served with a subpoena for the grand jury and had actually retained counsel who had already notified both the district attorney and the undercover agent of this fact.

We submit, therefore, that "Pickwickian" distinctions should not be made because Sanders was not technically indicted. The right to counsel and the interference therewith is at issue herein, and not *Miranda* warnings.

At a point in time when Sanders was a main target of an investigation and a grand jury proceeding against him was in

progress, coupled with the fact that he had retained counsel, the district attorney deliberately and intentionally encouraged its undercover agent, Goldberg, to obtain an incriminating statement from Sanders, in the absence of his lawyer, by deception and connivance. This strikes at the very heart of the Messiah doctrine, and we submit that it must be condemned.

POINT III

THE COURT OF APPEALS OF THE STATE OF NEW YORK UNANIMOUSLY HELD THAT THE PROSECUTOR'S CONDUCT HAD "VIOLATED THE STATE CONSTITUTIONAL RIGHT TO COUNSEL" OF THE PETITIONER HEREIN. FOUR JUDGES, HOWEVER, HELD THAT THE ERROR WAS HARMLESS. WE MAINTAIN THAT SINCE THE DISTRICT JUDGE BELOW FOUND THAT THE ERROR WAS NOT HARMLESS, COUPLED WITH THE INTERPRETATION OF SUCH CASES AS HENRY AND MASSIAH AND BREWER, THE DEPRIVATION OF COUNSEL UNDER THE CIRCUMSTANCES HERE APPARENT CANNOT BE CONSIDERED HARMLESS.

In the Court of Appeals of the State of New York, the 3 Judge dissenting opinion stated, *inter alia*, as follows:

"We are all agreed that the prosecutor's conduct violated the State Constitutional right to counsel." (emphasis supplied)

It should be noted that the language of the New York State Constitution parallels the language of the United States Constitution with respect to the right to counsel.

Furthermore, the New York Court of Appeals in *Sanders* noted as follows:

"Nevertheless the majority is to affirm on the ground that the error is harmless. However no case is cited,

and I know of none, in which this court has held that the use at trial of a statement obtained in violation of the defendant's state constitutional right to counsel has been held to be harmless." (emphasis ours)

Similarly, we have been unable to find a single federal case in the circumstances here present, where the deprivation of counsel has been held to be harmless. This is why we initially indicated to this Court that the question presented substantially is one of first impression.

Furthermore, as the three Judges dissenting opinion in Sanders in the N.Y. Court of Appeals noted:

"Thus the case does not involve a mere technical application of the embattled exclusionary rule, nor does it involve second guessing the necessarily hasty conduct of police officers on the street. Here the investigation was initiated and conducted throughout by members of the prosecutor's staff who, *knowing the defendant had retained counsel, not only permitted their undercover agent to discuss the case with the defendant, but actually encouraged the conversation* and arranged that it would occur at a place where it could be recorded for later use at trial." (Emphasis ours)

The Court of Appeals, in the dissenting opinion, further noted that an admission made at this stage is a "legal bombshell" (*Matter of Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 440) which is most likely to affect the jury's verdict . . . We have held, the Court of Appeals added, that if the statement has been illegally obtained, its use at trial requires reversal even when we have also expressly found that the other evidence of the defendant's guilt is "overwhelming" (*People v. Bevilacqua*, 45 N.Y.2d 508, 511, 515).

It is also important to note that the three-Judge dissent clearly found that since the *only evidence against the defendant* was the recordings of a dead man, Abram Brown, "whose veracity had

to be determined by the jury on a bare record", the defendant's admission in the June 9th tape was extremely virulent.

While the prosecutor urged that the testimony of Goldberg, who did not actually witness any crimes at all involving the defendant, was sufficient to convict, the Court of Appeals nevertheless found that "the prosecutor . . . obviously did not feel at trial that he could do without the statements of the defendant made after Brown's arrest, in which the defendant so clearly acknowledged his relationship with Brown and the crime then under investigation . . ."

It should be noted that from the general verdict of the jury we cannot tell whether the jurors relied upon the confession and admission of the June 9th, or not. Under *Jackson v. Denno*, 378 U.S. 368, 12 L.Ed.2d 908, the determination of a jury on a general verdict must assume that they considered the illegal evidence, unless there is clear indication to the contrary by a hearing, which in this case was not held. While there were specific requests that hearings be held to determine the admissibility of the statements, the Court below declined to do so.

In fact, it did not even instruct the jury properly on the question of admissibility of the statements in line with *Jackson v. Denno*, supra, and *People v. Huntley*, 15 N.Y.2d 72.

In view of the foregoing, we maintain that this is a classic case of a deliberate and premeditated and insidious interference with the right to counsel, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, and this Court should vacate the determination of the United States District Court and direct it to grant the writ of habeas corpus and to brand the actions of the State of New York as violative of the Sixth and Fourteenth Amendments of the United States Constitution.

We might add that in *Townsend v. Sain*, 372 U.S. 293, 9 L.Ed.2d 770, and *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, the Supreme Court has held that federal Constitutional criteria are applicable to the states.

CONCLUSION

To resolve this issue, which is one of first impression, namely whether the right of counsel and the Sixth Amendment may apply to suspects prior to indictment or arrest, this Court should grant certiorari.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of May, one thousand nine hundred and eighty four.

Present:

HONORABLE RICHARD J. CARDAMONE
Circuit Judge

HONORABLE GEORGE C. PRATT
Circuit Judge

HONORABLE DANIEL M. FRIEDMAN*
Circuit Judge

ORDER
Docket No.
84-2044

SHELDON SANDERS,

Petitioner-Appellant,

—against—

COMMISSIONER OF CORRECTIONS OF THE STATE
OF NEW YORK, ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF
NEW YORK,

Respondent-Appellee.

*Circuit Judge, United States Court of Appeals, for the Federal Circuit, sitting by designation.

Appeal from the Southern District of New York.

Petitioner Sheldon Sanders, a former attorney, appeals from an order of the United States District Court for the Southern District of New York (Broderick, J.) denying his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition challenges his conviction of bribery and conspiracy arising out of certain payoffs arranged by him with a law assistant in the New York Court system. Specifically, petitioner challenges the use of the tape recorded conversation of June 9 in which he made certain statements, allegedly in violation of his constitutional right to counsel. The facts reveal that at the time of the recorded conversation, petitioner had not been indicted. Petitioner was scheduled to testify before the grand jury in the investigation of the law assistant in the New York court system, and had retained the services of a lawyer.

In this appeal, petitioner argues that this case falls within the ambit of *Massiah v. United States*, 377 U.S. 201 (1964) and that the incriminating statements "deliberately elicited" from him violated his right to counsel. We disagree. Unlike here, the petitioner in *Massiah* had already been indicted, pled to the charge, and was free on bail at the time the elicited statements were gleaned from him. The *Massiah* opinion found a constitutional violation, but was narrowly drafted to encompass cases where agents deliberately elicit statements from an individual *after* he is indicted.

Similarly, *Brewer v. Williams*, 430 U.S. 387 (1977) offers no support for the petitioner here for in that case, the Court in unmistakable language, wrote that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer *at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'*" 430 U.S. at 398; quoting *Kirby v. Illinois*,

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

406 U.S. 682, 689 (1972) (emphasis supplied). *See also United States v. Henry*, 447 U.S. 264 (1980).

Under the circumstances of this case, we agree with the district court that no federal constitutional violation was stated. Accordingly, we affirm the decision of the district court.

Richard J. Cardamone, U.S.C.J.

George C. Pratt, U.S.C.J.

Daniel M. Friedman, U.S.C.J.

2

AUG 16 1984

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
October Term, 1984

SHELDON SANDERS,

Petitioner,

against

COMMISSIONER OF CORRECTIONS OF THE STATE
OF NEW YORK and ROBERT ABRAMS, ATTORNEY
GENERAL OF THE STATE OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

ROBERT M. MORGENTHAU

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Counter Statement of the Question Presented

Does the federal constitutional right to counsel attach where a person has retained counsel in connection with a grand jury proceeding, but is not in custody and no adversary proceedings have commenced against him? The court below answered this question in the negative.



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Docket No. 84-71

IN THE
Supreme Court of the United States
October Term, 1984

SHELDON SANDERS,

Petitioner,

against

COMMISSIONER OF CORRECTIONS OF THE STATE OF NEW YORK
and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF
NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

Preliminary Statement

Sheldon Sanders petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit which, on May 17, 1984, affirmed a decision of the United States District Court for the Southern District of New York (Vincent L. Broderick, D.J.) denying his petition for a writ of habeas corpus. The petition sought an order vacating

a January 15, 1980, judgment of the New York State Supreme Court convicting petitioner after a jury trial of two counts of Bribery in the Second Degree and one count of Conspiracy in the Third Degree (New York Penal Law §§200.00, 105.05). Petitioner was sentenced to concurrent indeterminate terms of imprisonment of from one to three years on each of the two bribery counts, and to a concurrent ninety-day jail term on the conspiracy count. Petitioner has been released on parole.

Statement of the Case

The State Court Proceedings

In January, 1977, petitioner, an attorney, told his co-counsel in a litigation, Paul Goldberg, that he had paid \$250 to a court official to obtain a stay in a civil law suit. Goldberg promptly reported this information to the New York County District Attorney's office and, for the next few months, assisted that office in its investigation of corruption in the New York County Supreme Court. Specifically, Goldberg recorded all his conversations with petitioner and with Abram Brown, the corrupt court official, during which petitioner and Brown furthered their conspiracy to obtain favorable results in the lawsuit in return for payments to Brown. On three occasions in the course of his conversations with Goldberg, petitioner admitted on tape that he had paid Brown \$250 for the stay and acknowledged that he had been reimbursed by Goldberg in a check for half of that payment.

At the end of May, 1976, as the investigation of Brown's activities culminated, petitioner received a grand jury sub-

poena, which provoked two responses. First, petitioner retained counsel. Second, petitioner began a series of frantic attempts to speak to Goldberg, attempting to call him at his home, his office, and at other attorneys' offices. Goldberg avoided these calls for a week or so, and even called petitioner's lawyer, seeking to discourage petitioner from continuing his efforts to reach Goldberg. Finally, however, on June 9, Goldberg received a call from petitioner's secretary and gave her a telephone number where Goldberg could be reached. When petitioner called Goldberg at that number, they had a last conversation, which like all the earlier ones, was recorded. At the time of the final conversation between petitioner and Goldberg, petitioner was not in custody and no adversarial proceedings had commenced against him. In that last conversation on June 9, petitioner insisted that he and Goldberg should meet so that they would be "consistent" in the grand jury. When Goldberg, however, said he was going to tell the truth, petitioner finally agreed that he, too, would admit—as he had on three prior occasions—that he "had [had] a dealing" with Brown.

Petitioner was subsequently indicted for three counts of bribery and one count of conspiracy. One bribery count charged petitioner with paying money to Brown throughout the course of the conspiracy; a second bribery count concerned a \$100 payment to Brown during the course of the investigation; and a third concerned the \$250 payment petitioner made before the investigation began. Petitioner was convicted of the conspiracy count and two counts of bribery, and he was acquitted of the bribery count which charged him with paying Brown the \$250 bribe.

Petitioner appealed his conviction to the Appellate Division of the New York Supreme Court, which unanimously affirmed his conviction without opinion on April 9, 1981. 81 A.D.2d 520. On May 18, 1982, the New York Court of Appeals also affirmed petitioner's conviction. 56 N.Y.2d 51, 451 N.Y.S.2d 30. In its decision, the Court of Appeals found that the last telephone conversation between petitioner and Goldberg on June 9th had violated petitioner's state constitutional right to counsel, despite the fact that petitioner was not in custody and no adversarial proceedings had begun against him when the call was recorded. The court nevertheless held that the "overwhelming proof" of petitioner's guilt rendered the error harmless.

In June, 1982, petitioner filed a petition for a writ of habeas corpus in federal court, claiming that his federal constitutional right to counsel was violated by the use in evidence of the June 9th conversation. Judge Broderick denied that petition in a decision on February 2, 1984, and the Court of Appeals for the Second Circuit affirmed the district court's decision on May 17, 1984.

Petitioner seeks certiorari from this Court on the grounds that his federal constitutional rights to counsel and to due process were violated by the introduction into evidence of his June 9 conversation with Goldberg.

Reasons for Denying the Writ

This Court have made it clear that the federal constitutional right to counsel attaches only upon the commencement of adversary proceedings by way of a formal charge, preliminary hearing, indictment, information, or arraign-

ment. *Massiah v. United States*, 377 U.S. 201, 206 (1964); *Kirby v. Illinois*, 406 U.S. 682, 688-689 (1972); *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Estelle v. Smith*, 451 U.S. 454, 469-470 (1981). Indeed, even if petitioner had been subpoenaed as the "target" of the grand jury investigation, "[n]o criminal proceeding [had] been instituted against him, hence the Sixth Amendment right to counsel [had] not come into play." *United States v. Mandujano*, 425 U.S. 564, 581 (1976).^{*} Moreover, that New York has interpreted its constitution in a different way is no reason for granting the writ.

Furthermore, there is no conflict in the circuits to resolve, and this Court has denied certiorari in a succession of cases in which federal courts have uniformly held that a suspect's federal right to counsel had not attached even though the suspect had retained a lawyer in connection with an investigation or a grand jury proceeding. *United States v. Mitlo*, 714 F.2d 294, 295, 296-297 (3rd Cir. 1983), *cert. denied*, 104 S. Ct. 550 (1983); *United States v. Sikora*, 635 F.2d 1175 (6th Cir. 1980), *cert. denied*, 449 U.S. 993, 1176-1177 (1980); *United States v. Ammar*, 714 F.2d 238, 260-261 (3rd Cir. 1983), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 165 (1983); *see also United States v. Dobbs*, 711 F.2d 84, 85 (8th Cir. 1983).

A rule such as the one urged by petitioner would cripple law enforcement, since it would encourage seasoned crim-

^{*} Without any citation to the record, petitioner refers to himself as the "subject" of the grand jury investigation (petitioner's brief at 5, 6, 19-20). In fact, it was Brown's activities which were the focus of the grand jury. *People v. Sanders*, 56 N.Y.2d at 66, 451 N.Y.S.2d at 37.

inals to invoke "house counsel" on retainer as a shield against necessary and legitimate covert investigations. See *United States v. Masullo*, 489 F.2d 217, 222-223 (2d Cir. 1973); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982); see also *United States v. Kenny*, 645 F.2d 1323, 1338 (9th Cir. 1981), *cert. denied*, 452 U.S. 920 (1981).

In sum, the court below followed the rule established by this Court, and the federal constitution plainly does not bar the use of statements made by someone not in custody and against whom no adversary proceedings have begun, simply because he has retained counsel in connection with an investigation or a grand jury proceeding.

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
 New York County

ROBERT M. PITLER
 OSCAR GARCIA-RIVERA
 Assistant District Attorneys
Of Counsel

August, 1984

